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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1009 65

J. C. CROCKETT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

No. 1010 66

J. C. CROCKETT,

Petitioner,

vs.

GEORGE H. McELROY AND PETER A. HANNA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

OLIVER M. LOOMIS,
South Bend, Indiana;
CARLISLE DURFEE,
Chicago, Ill.;
JOSEPH M. SANDERS,
Bluefield, W. Va.;
Counsel for Petitioner.

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GEORGE H. McELROY AND PETER A. HANNA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

J. C. Crockett, trading and doing business as Central Motor Sales Company at Princeton, Mercer County, West

Virginia, respectfully represents that he is aggrieved by certain judgments of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above consolidated cases on December 21, 1940, affirming judgments of the United States District Court for the Southern District of West Virginia, in favor of the United States of America, George H. McElroy and Peter A. Hanna, against petitioner in the sums of $575.00, $2795.33, and $3116.50, respectively, and therefore, petitioner prays that writs of certiorari should issue from this Honorable Court to review said judgments of said Circuit Court of Appeals for the Fourth Circuit.

Opinions Below.

The United States District Court for the Southern District of West Virginia did not file a written opinion in rendering judgment in these cases.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is reported in Federal Reporter Advance Sheet, February 17, 1941, page 646, and will be found on page 186 of the printed record. Judge Dobie's dissenting opinion will be found on page 196 of the printed record. A petition for a re-hearing was denied on February 6, 1941.

Jurisdiction.

The judgments of the United States Circuit Court of Appeals for the Fourth Circuit were entered on December 21, 1940. A petition for re-hearing was duly filed and was refused by an order entered on February 6, 1941.

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; U. S. C. A. Title 28, Section 347(a).

Questions Presented.

The sole question presented in these cases is whether the evidence is sufficient to support the jury's verdict and the judgments entered thereon. Petitioner contends that the jury's verdicts are contrary to the law and the evidence and are not supported by the evidence, and for that reason, the lower court should have set the verdicts aside, and that the Circuit Court of Appeals erred in affirming said judgments. More specifically, the questions presented for determination are as follows:

Question No. 1.

Is an automobile dealer liable for the negligent acts of the driver of the dealer's automobile occurring under the following circumstances?

An automobile dealer employs a salesman on a commission basis; no salary. The hours of service are not fixed. The salesman works if, as and when he pleases. The salesman has authority to use the employer's car on employer's business but not for the salesman's own personal pleasure and convenience. The cars are kept on the employer's used-car lot, and when the salesmen wishes to secure a car for the purpose of demonstration or sale, he obtains permission from the employer and secures the keys from the office. On the day of the accident, the salesman obtained from the employer permission to take a car for the purpose of interviewing and demonstrating the car to a prospect. The salesman did not attempt to see the prospect, but falls in with two male friends, neither of whom are prospects for the sale of the car in question. The car was not at any time demonstrated or attempted to be sold to either of said friends. The salesman and the male friends became intoxicated and went for a joy ride lasting from 9 a. m. until 4 p. m. About 9 a. m., and again about 11 a. m., the

salesman attempts to interest one friend in the purchase of a new DeSoto car, but the friend displays no interest. The subject was not thereafter discussed. About 4 p. m., the automobile containing the salesman, two male friends and one female friend and headed toward a beer joint for the purpose of having a party, and while being driven by one of the male friends without the knowledge or consent of the employee, who was unconscious from drink, and lying in the rear seat of the car, negligently collided with another car, and caused personal injuries and property damage. The evidence does not disclose that the employee had ever taken a drink of liquor prior to the day of the accident or that the employer knew or had any reason to believe that the employee was addicted to the use of intoxicating liquors, or was an incompetent driver. The injured party sues the employer on the theory that the driver of the car was the agent and representative of the employer and acting on the employer's business, and that employer is responsible for the negligent acts of the driver.

Question No. 2.

Under the facts stated in Question No. 1, was the Circuit Court of Appeals justified in holding that because the salesman became intoxicated on the day of the accident that the jury could infer (a) that the employee was in the habit of becoming intoxicated; (b) that the employer either knew or should have known of such habit; (c) that, therefore, the employer was negligent in turning his car over to said employee.

Question No. 3.

Under the facts stated in Question No. 1, was the court justified in rendering judgment against the employer on the ground that the employee was a drunkard; that the employer either knew or should have known this fact, and

was therefore negligent in turning his car over to said employee, especially in view of the fact that the injured party sought recovery against the employer on the sole ground of agency, and the question of agency was the only issue submitted to the jury or tried in the lower court. The question of the negligence of an employer in turning his car over to an employee known to be addicted to the use of intoxicating liquor, an entirely different cause of action from the one declared on, if in fact it constitutes a cause of action, was not raised in the lower court, either in the pleadings or evidence, or instructions submitted to the jury, and there was not a scintilla of evidence to support such a finding except the bare fact that on the day of the accident the employee became intoxicated.

Statement.

On November 17th, 1939, in the District Court of the United States for the Southern District of West Virginia, George H. McElroy instituted a civil action against Central Motor Sales Company, a Corporation, J. C. Crockett, Robert Holt, Frank Ellison and Peter A. Hanna, to recover damages for personal injuries sustained by him on February 20, 1939, about 4 o'clock p. m., about one mile east of the corporate limits of the City of Princeton, West Virginia, when an automobile alleged to have been operated by Frank Ellison and Robert Holt as the agents and representatives of Central Motor Sales Company, a Corporation, and J. C. Crockett, and approaching a car operated by McElroy, and another automobile owned and operated by Peter A. Hanna, which was closely following McElroy, collided with the automobile then and there being operated by McElroy and said collision resulted in injury to McElroy and the demolition of the car operated by him. McElroy was an employee of the Federal Bureau of Investigation, and the

car operated by him was owned by the United States of America, and on the same date the United States of America instituted a civil action against the same defendants named in the first action to recover for damages to said automobile.

Thereupon, J. C. Crockett filed an answer in both cases, admitting that on the day of the accident he was trading and doing business as Central Motor Sales Company, but denied that said business was incorporated, and further alleged that he was the owner of the Plymouth sedan which collided with the car being driven by McElroy, and that said Plymouth car at the time of said accident was being operated by Frank Ellison, but denied that said Frank Ellison or Robert Holt (correct name Herbert Holt) another occupant of said Plymouth car, were his agents or representatives, or engaged in any business for him at the time of said accident, and further disclaimed any and all liability for said accident.

Thereupon, Peter A. Hanna filed a written answer denying any negligence on his part, and alleged that the sole cause of the accident was the joint negligence of McElroy and J. C. Crockett, Robert Holt and Frank Ellison, which answer further alleged that Hanna suffered personal injuries and property damage in said collision, and set up a counter-claim for said damages against McElroy, Crockett, Holt and Ellison.

Thereupon, on the day of trial, Herbert Holt, improperly sued as Robert Holt, filed an answer setting forth that his correct name was Herbert Holt; that at the time of said accident he was riding in the Plymouth sedan owned by Crockett, but that he was not driving said car, and that at the time of said accident, he was not acting as the agent or representative of J. C. Crockett, and was not engaged in any business for J. C. Crockett.

Thereupon, it was agreed by and between counsel for McElroy, Hanna, The United States of America, Crockett and Holt that said cases might be consolidated and heard together, and this was done by a proper order.

Frank Ellison was present in court as a witness, but was not represented by counsel.

Thereupon, McElroy and The United States of America introduced their evidence and rested, at which time, Hanna, Crockett and Holt moved for directed verdicts, but said motions were overruled. Thereupon Crockett and Holt introduced their evidence and rested, and Hanna introduced his evidence and rested, and at the conclusion of his evidence, Hanna adopted the same testimony given on behalf of The United States and McElroy "as to the agency in this case" (R. 144). Thereupon, Crockett, Holt and Hanna again moved for directed verdicts which motions were again overruled. Thereupon the case was argued by counsel, and the jury received the court's charge and proceeded to consider of its verdict, and later returned the following verdicts:

(1) A verdict in favor of Hanna on McElroy's claim against Hanna;

(2) A verdict in favor of McElroy on Hanna's counter-claim against McElroy;

(3) A verdict in favor of Hanna on Hanna's counter-claim against Crockett, Holt and Ellison, for the sum of $3116.50;

(4) A verdict in favor of McElroy against Crockett, Holt and Ellison for $2795.33; and

(5) A verdict in favor of The United States of America against Crockett, Holt and Ellison for $575.00.

There is no question as to the form of the verdicts.

Thereupon, Crockett and Holt moved the court to set aside said verdicts and award them and each of them a new

trial, and to enter judgment in their favor, notwithstanding the jury's verdicts, which motions were overruled and the court entered judgment on the jury's verdicts.

Petitioner J. C. Crockett alone appealed from the above mentioned judgments in favor of Hanna, McElroy and The United States of America to the United States Circuit Court of Appeals for the Fourth Circuit, which court, on December 21, 1940, affirmed the judgments of the District Court. Petitioner applied for a re-hearing which was refused on February 6th, 1941.

Statement of Facts.

The accident involved herein occurred on February 20th, 1939, about 4 p. m., about one mile east of the corporate limits of Princeton, West Virginia. McElroy, a Federal Bureau of Investigation agent, operating a car owned by United States of America, was driving in a westerly direction toward Princeton, West Virginia, and Peter A. Hanna was also driving toward Princeton, and closely following the car driven by McElroy. So far as the evidence discloses both McElroy and Hanna were driving at a reasonable rate of speed and in a proper manner. As McElroy ascended a slight hill and reached the crest thereof, he observed a truck approaching from the opposite direction and almost instantly a car which was following close behind the truck, and traveling at a very fast rate of speed, attempted to pass the truck, and in doing so, drove to the left of the center of the road and collided with the car being driven by McElroy, which was on the proper side of the road. Almost simultaneously with the first collision the car operated by Hanna and which was closely following the McElroy car crashed into the rear of the McElroy car. Both McElroy and Hanna were injured and the cars operated by them were considerably damaged, and petitioner does not question either the amounts of the several

verdicts, or the fact that Ellison's negligence was the proximate cause of the accident. Petitioner's sole contention is that he is not responsible for the acts of Frank Ellison and Herbert Holt, who are alleged to have been operating petitioner's Plymouth sedan at the time of the accident.

The Plymouth car approaching from the west and which crashed into McElroy was owned by petitioner, who at that time was engaged in the business of selling new and used cars at Princeton, West Virginia, under the name of Central Motor Sales, and was driven by one Frank Ellison. Ellison was not an employee of petitioner, and so far as the evidence discloses was not known to petitioner. Other occupants of the Plymouth sedan at the time of the accident were Robert Weikel, who was riding on the front seat next to Ellison, the driver, Vergie Keatley, who was sitting on the front seat next to the right door, and Herbert Holt, sued herein as Robert Holt, who was lying in the rear seat unconscious from drink. All of the above named occupants of the Plymouth sedan were highly intoxicated and, as stated, Herbert Holt was lying on the rear seat and had "passed out".

Due to the fact that there is only one question involved in this case, namely, the responsibility of petitioner for the acts of Ellison and Holt at the time of the accident, we will not burden this petition with the details of the accident. The evidence clearly justified the jury in finding that Ellison's negligence was the proximate cause of the accident. We shall, therefore, set forth the facts showing the relationship existing between petitioner and the occupants of petitioner's car; the manner in which the car had been obtained and the object and purpose of the journey on which the car was engaged at the time of the accident. The following facts appear from the evidence, which is singularly free from conflict.

Petitioner was engaged in the business of selling new and used cars at Princeton, West Virginia, under the name of Central Motor Sales, which he individually owned. Herbert Holt had been in petitioner's service for approximately one year as a car salesman. Holt did not have regular working days or hours; he worked if, as and when he pleased. He was not paid a salary, but worked purely on a commission basis (R. 98). He had the right to use petitioner's automobiles for business purposes only, but did not have the right to use them for his own personal pleasure and convenience. When he had a prospect, he would talk the matter over with petitioner and get petitioner's permission to take the car out; that when he wanted to demonstrate the car to a prospective purchaser, he would get petitioner's permission; that the cars were kept in the garage and on the used-car lot, and the keys were kept in the office. After he, Holt, had demonstrated the car, he would place it in the used-car lot or in the garage; that he never used petitioner's cars in going to and from his home at night (R. 98-99); that he had authority when demonstrating cars to prospective purchasers to allow them to drive the cars (R. 100); but did not have the authority to permit other persons to drive the cars (R. 117); that he always talked it over with petitioner before taking a car out to demonstrate to a prospective purchaser (R. 100). The foregoing facts with reference to Holt's authority were testified to by Holt as a witness for McElroy and The United States of America, and this evidence was later expressly adopted by Hanna (R. 144). There is no evidence in the record to the contrary.

Prior to the day of the accident, Holt had a prospect for the sale of a car at Hiawatha, West Virginia, a man by the name of Hale. About nine o'clock a. m., on the morning of the accident, Holt inquired of petitioner whether he should take the car and go to see Hale at Hiawatha, and peti-

tioner said that he thought this would be a good idea. Holt then secured the keys to the car and left petitioner's garage driving the car (R. 118). There is no evidence showing or tending to show that Holt had been drinking when he left the garage with petitioner's car; to the contrary, the evidence clearly shows that the drinking began later.

When Holt left petitioner's place of business, it was his intention to go to Hiawatha and see Hale. That was Holt's understanding with petitioner. However, Holt did not go to Hiawatha to see Hale; instead, he drove the car down the main street of Princeton, and near the Virginian Railway station met Frank Ellison, whom he had known for several years, but whom he had not seen for about a year (R. 81). Holt stopped and Ellison got in the car and Holt asked Ellison about one of Holt's prospects for a car in Monroe County. Prior to that time Ellison had never helped Holt sell a car and had never given him the name of a prospective purchaser (R. 123).

After interrogating Ellison about Holt's prospect in Monroe County, Holt and Ellison had a general conversation (R. 118). They had been talking about fifteen or twenty minutes when Robert Weikel came up and joined in the conversation. Ellison and Weikel were old friends and had been out together the night before, but Holt had not met Weikel. During this conversation, according to Ellison, Holt tried to interest Weikel in a new DeSoto car, but Weikel did not appear to be interested in a new car at that time, or a used car in any event (R. 74, 75 and 80). Weikel then produced a pint bottle with some liquor in it and Ellison, Holt and Weikel went down to the coal yard to drink the liquor. They stayed at the coal yard approximately 20 or 30 minutes, and after consuming the pint of liquor, they proceeded to the liquor store, and Ellison went in and purchased another pint with money furnished by Weikel. After leaving the liquor store, Holt, at the request of Elli-

son and Weikel, took them back down town to let them out (R. 119); but after they got back down town, Weikel and Ellison requested Holt to take them out on the Athens road to take a drink of liquor (R. 119). Holt agreed to this and drove the car out on the Athens road where he, Ellison and Weikel consumed the second pint. Ellison says that while they were out on the Athens road, Holt again talked to Weikel about selling Weikel a car (R. 80). Holt and Weikel are not entirely clear as to where the conversation took place between them with reference to this new DeSoto car, but it is entirely clear from the evidence that the subject was discussed down near the railway station about 9 o'clock a. m., or out on the Athens road about 10:30 or 11 o'clock a. m., or possibly at both places. However, the evidence is quite clear that this subject was not mentioned after leaving the Athens road about 11 o'clock a. m. (R. 74-75, 80 and 89). On page 89 of the printed record, Weikel states that the car was out on the Athens road about 2 or 2:30 p. m. However, on further questioning, it clearly appears that Weikel was mistaken as to the time, and that in truth and in fact, the car was out on the Athens road about 10:30 or 11 a. m. We quote from Weikel's testimony appearing on pages 88 and 89 of the printed record:

> "Q. 1. As I understand it, then, the only time you talked with Herbert Holt or he talked with you about trading cars was out on the Athens road. A. That's the only time I call to memory.
>
> Q. 2. And about what time of day was that? A. I don't just remember. It must have been around two o'clock, I suppose, or two-thirty, something near that. I don't just remember.
>
> Q. 3. What time did the accident happen? A. Well, I don't remember that exactly. Don't remember what time it happened.
>
> Q. 4. You were out on the Athens road early in the morning, weren't you? A. Yes, out on the Athens road, in the morning this was.

Q. 5. What time was it when he mentioned to you about trading cars? A. I don't remember. I don't think I saw him until about ten o'clock.

Q. 6. About how long was it after you saw him? A. I imagine something like thirty minutes; something like that.

Q. 7. You saw him down at the station at Princeton? A. Yes, sir, close to the station.

Q. 8. I believe you had a little liquor? A. Yes, sir.

Q. 9. And you and Frank and Herbert Holt went down to the coal yard and drank some liquor? A. Yes, sir.

Q. 10. Then you decided to go out on the Athens road? A. Yes, sir."

From the foregoing, it clearly appears that the car was out on the Athens road about 10:30 or 11 o'clock a. m. And it is also clear that if Holt made any effort to sell Weikel a new car, it was out on the Athens road.

After consuming the second pint of liquor on the Athens road, Holt, Weikel and Ellison went back to the liquor store to secure a third pint of liquor. This was the last Holt remembers until he regained consciousness after the accident (R. 120). Holt did not remember asking Weikel or Ellison to drive the car, and did not know until after the accident that either of them had driven it. Holt did not attempt to sell this particular car to Weikel, Ellison or any other person and was not demonstrating it, and had not demonstrated it to any person that day. Weikel was not in the market for a used car; in fact, he had a Ford V-8 1937 model which was in better condition than the Plymouth car in which they were riding (R. 76) and Weikel was not interested in any car at that particular time (R. 74, 75, 76 and 80).

After purchasing the third pint of liquor, the evidence is by no means clear where Holt, Ellison and Weikel went. Ellison testified that about noon, they stopped at the West End filling station at Princeton to get a chaser, stayed ten

or fifteen minutes (R. 77); and that at this point Herbert Holt asked him, Ellison, to drive, but that he, Ellison, replied that he did not have an operator's license and that he, Ellison, said "Let Bob drive, and Bob started driving", and Ellison further testified that after this Holt did not again ask him, Ellison, to drive (R. 78). Weikel's version of this is somewhat different from Ellison's. Weikel remembered being at the West End filling station and testified that Ellison said to him, "Bob, drive it and see how you like it", and that at this time Holt was lying down in the rear seat, and he does not remember whether Holt heard the conversation (R. 87, 88). However, it is an admitted fact that Weikel drove the car from the West End filling station to the DeLuxe Sandwich Shop, a beer joint located on the Princeton-Beckley highway, reaching there, according to the proprietor, between 12 and 1 o'clock (R. 110); and when they reached the DeLuxe Sandwich Shop, Weikel and Ellison, who were very drunk at that time, got out of the car and went into the sandwich shop. Holt did not get out of the car, he was lying in the rear seat "passed out".

Weikel and Ellison stayed at the sandwich shop fifteen or twenty minutes and left in company with a woman by the name of Vergie Keatly, who the evidence discloses was also very drunk (R. 114, 116, 106 and 84). Vergie Keatly told Ann Blevins that they, (meaning Weikel, Ellison and herself) were going out to a cabin (R. 108). When the car left the DeLuxe Sandwich Shop, Ellison was driving, Weikel was next to Ellison on the front seat and Vergie Keatly was in the front seat next to the right door. Holt was still lying in the rear seat "passed out".

Holt was not consulted with reference to the proposed party, and did not request Ellison or anyone else to drive the car; in fact, he had no knowledge of what transpired for several hours prior to the accident.

None of the occupants of the car remembered where they went after leaving the DeLuxe Sandwich Shop about 1 p. m., until the time of the accident, which occurred about 4 p. m. In fact, Weikel did not remember where they picked up Vergie Keatly (R. 112-114).

Two witnesses, Pansy Burnett (R. 112-114) and Vergie Hunter (R. 114-117), saw Weikel, Ellison and Vergie Keatly about 3:30 or 4 p. m., in East Princeton, and at that time Weikel, Ellison and Vergie Keatly were all very drunk, and Holt was still lying in the rear seat apparently unconscious, and at that time, Weikel, Ellison and Vergie Keatly said they were going to Gooch Harris' place and throw a party, and wanted the witnesses Pansy Burnett and Vergie Hunter to go along. However, these girls refused to go because the occupants of the car were all drunk. Gooch Harris' place is a beer joint located on the Princeton-Oakvale road about 5 miles from Princeton, where cabins are rented. According to Pansy Burnett, when she and Vergie Hunter refused to go along, they, meaning Ellison and Weikel and Vergie Keatly, starting blowing the horn in front of her house, and when she went out, they "took off like a cyclone"; (R. 114).

There is little, if any, conflict in the evidence in this case, and we desire at this point to summarize some of the material facts about which there is not the slightest conflict. On the morning of the accident, Holt left petitioner's place of business in petitioner's car for the express purpose of going to Hiawatha to attempt to sell the car to a Mr. Hale, a prospective purchaser, and petitioner agreed to the use of the car by Holt for this purpose. Holt left the garage about nine a. m., and there is no evidence showing or tending to show that he was drinking. He fell in with Ellison and Weikel, and the three proceeded to get very drunk. Neither Ellison nor Weikel was a prospective purchaser for this particular car, and the car was not used that day for the

purpose of demonstrating it or attempting to sell it to either Weikel, Ellison or Vergie Keatly, or to any other person. Ellison's operator's license had been revoked and he was not a prospect for any car, new or used. Weikel seemed to be a prospect for a new car at a later date, but was not a prospect for a used car. Holt mentioned selling Weikel a new car on one or possibly two occasions, and found that Weikel was not interested in buying a new car at that time. This was discussed once at the Virginian Railway station about 9 a. m., and again out on the Athens road about 10:30 a. m., according to Weikel (R. 89), and between 10 and 11 a. m., according to Ellison (R. 80). The sole purpose of the trip out on the Athens road was to drink liquor (R. 77 and 119), and the sole and only purpose of the entire trip, commencing at nine a. m., and ending in the collision about 4 o'clock p. m., was, according to Holt, Weikel and Ellison, to joy ride and drink liquor (80, 81, 92 and 121). The evidence is conclusive that the accident occurred about 4 p. m.; (see evidence of McElroy, R. 24; Hanna, R. 136; Dr. Hale, R. 50; Dr. Todd, R. 54; Pansy Burnett, R. 112, and Vergie Hunter, R. 115).

All of the occupants of petitioner's car were drunk at the time of the collision and Holt was unconscious. Holt did not know who was driving the car, or where it was going. Ellison began driving the car at the DeLuxe Sandwich Shop while Holt was unconscious and without the knowledge or consent of Holt. This was approximately 3 hours prior to the accident. No one requested Ellison to drive. At the time of the collision, petitioner's car was being driven in the opposite direction from Princeton, and towards Gooch Harris' beer joint on the Oakvale road, at which place Weikel, Ellison and Vergie Keatly intended to rent a cabin and have a party. Holt did not have the right to use this car for his own pleasure or convenience, or to drive to and from his home. He could only use it on business of peti-

tioner and after obtaining permission to do so, and after demonstrating the car to prospective purchasers, it was his duty to return it to the garage or the used-car lot. He was not a salaried employee, but worked purely on a commission basis. He worked if, as and when he pleased. The above facts with reference to Holt's authority were brought out by Holt, testifying as a witness for the United States of America, and McElroy, and this evidence was later expressly adopted by Hanna, and there is not the slightest evidence to the contrary.

Except for the fact that Holt became intoxicated on the day of the accident, there is not a scintilla of evidence in the entire record showing or tending to show that he was a man of inebrious habits or that prior to the day of the accident he had ever taken a drink of liquor, or that he was an incompetent driver or an irresponsible person, and it obviously follows that there is no evidence to the effect that petitioner knew or had a reason to believe that Holt was a person of inebrious habits or an incompetent driver or an irresponsible person.

Except for the fact that Holt on the day of the accident, about 9 a. m., and again about 11 a. m., which was approximately five hours prior to the accident, attempted to sell Weikel a new DeSoto car, there is no evidence showing or tending to show that Holt was acting on the business of petitioner at the time or on the day the accident occurred. To the contrary, the evidence shows without conflict that Holt was unconscious from drink from about 1 p. m., to 4 p. m., when the accident occurred, and that at the time of the accident, the car, driven by Ellison, without the knowledge or consent of Holt, was headed for Gooch Harris' beer joint for the purpose of renting a cabin and throwing a party.

As above stated, the United States of America, McElroy and Hanna have proceeded throughout upon the theory that

at the time of the accident, Ellison and Holt were acting as the agents of petitioner, and that therefore petitioner is liable for said negligent acts. In other words, that the principle of respondeat superior fixes petitioner's liability. This was the theory upon which the complaints were drawn, the theory upon which the case was tried in the District Court, and the theory upon which the jury were instructed and the case argued. Plaintiff did not proceed on the theory that Holt was a man of inebrious habits or an incompetent driver or an irresponsible person, and that petitioner had knowledge thereof, and as above stated, except for the admitted facts that Holt became intoxicated on the day of the accident, there is no evidence whatever to support such a theory. The Circuit Court of Appeals apparently based its judgment on the last mentioned theory.

Specification of Errors to be Urged.

The United States District Court for the Southern District of West Virginia, and the United States Circuit Court of Appeals for the Fourth Circuit erred in holding that the evidence was sufficient to justify the jury in finding that petitioner was responsible for the acts and conduct of Ellison and Holt at the time of the occurrence of the accident involved in this case.

Reasons for Granting the Writs.

There are two special and important reasons for granting writs of certiorari in these cases:

(1) These cases involve important questions of general law, and in rendering judgments against petitioner, the Circuit Court of Appeals for the Fourth Circuit has decided important questions of general law in a way untenable and in conflict with the decisions of the Supreme Court of Appeals of West Virginia, the United States Circuit Court of

Appeals for the Fourth Circuit, other Circuit Courts of Appeals, and the Supreme Court of the United States, and against the clear weight of authority.

That the cases are important and the decision erroneous is indicated by Judge Dobie's dissenting opinion (R. 196), from which we quote:

> "I regret that I cannot concur in the majority opinion in these cases. *As these cases seem to me highly important,* and, further, since the field of liability for injuries received in automobile accidents (particularly when the relation of agency is involved) *is one of increasing public concern,* I am setting forth, probably at greater length that is customary in dissenting opinions, reasons for the legal faith that is in me."

(2) In affirming the judgments against petitioner, the Circuit Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

In deciding these cases, the Circuit Court of Appeals drew from the evidence material and controlling conclusions not warranted by any view of the evidence, and using as a basis said erroneous conclusions, the court decided the case upon an issue not raised or mentioned in the pleadings, not submitted to the jury in the court's charge, not considered by the court, and on which issue no evidence whatever was offered by any of the parties to these actions. The cause of action declared on was based on respondeat superior—agency. The case was tried and submitted to the jury on this theory. However, the Circuit Court of Appeals affirmed the judgments on the ground that Holt was a man of inebrious habits, that petitioner knew this fact, or should have known it, and was therefore negligent in entrusting his car to Holt, an entirely different cause of action from the one

pleaded and tried in the lower court, if, in fact, it states a cause of action, and one without the slightest evidence to support it.

Petitioner is entitled to be fully and fairly informed of the charges against him so that he can prepare his evidence to meet such charges. He is entitled to have the case decided upon the issue or issues raised in the pleadings, and tried in the court below. Any ruling which deprived him of such rights and deprived him of an opportunity to be heard is unreasonable and unjust, and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

We, therefore, respectfully submit that the ruling of the Circuit Court of Appeals for the Fourth Circuit calls for the exercise of the supervisory power of this court, and that writs of certiorari should issue from this Honorable Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, to the end that the judgments complained of herein may be reviewed and reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1009

J. C. CROCKETT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

No. 1010

J. C. CROCKETT,

Petitioner,

vs.

GEORGE H. McELROY AND PETER A. HANNA.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

A statement of facts sufficient for the determination of this case appears in the petition for writs of certiorari and will not be repeated here.

Propositions Relied On to Reverse Judgment of Lower Court.

A.

The evidence is not sufficient to justify the jury in finding that at the time of the accident Ellison was operating petitioner's car as the agent for and on the business of petitioner.

B.

The evidence is not sufficient to justify the jury in finding that at the time of the accident Ellison was operating petitioner's car with the knowledge and consent of Herbert Holt.

C.

The evidence is not sufficient to justify the jury in finding that Holt was a person of inebrious habits; that petitioner knew of said habits, and that petitioner was, therefore negligent in allowing Holt to drive petitioner's car.

D.

The Circuit Court of Appeals erred in deciding these cases upon issues not raised in the pleadings, not submitted to the jury, nor considered by the District Court, and upon which issues no evidence whatever was introduced by any of the parties hereto.

ARGUMENT.

A.

The evidence is not sufficient to justify the jury in finding that at the time of the accident Ellison was operating petitioner's car as the agent for and on the business of petitioner.

We submit that it is entirely clear from the evidence that at the time of the accident Frank Ellison was not

operating petitioner's car as the agent for and on the business of petitioner, but that the car was being operated solely for the pleasure and convenience of the occupants thereof, and not for any purpose connected with petitioner's business.

What was the object and purpose of the trip on which this accident occurred? The sole object and purpose of the trip was to go to Gooch Harris' beer joint and secure a cabin and throw a party. This information was given to Pansy Burnett and Vergie Hunter by Weikel, Ellison and Vergie Keatly about 3:30 or 4 o'clock p. m., on the day of the accident (R. 113, 115). There is no evidence to the contrary. At this time, Weikel, Ellison and Vergie Keatly were drunk and Holt was passed out in the rear seat, and had been passed out since about 1 p. m., when the party left the DeLuxe Sandwich Shop (R. 110). How is it possible for anyone to contend that this trip was undertaken in the interest of petitioner, or that Ellison was acting as the agent for petitioner on this trip? What possible interest did petitioner have in this escapade? The car was not being demonstrated to Ellison, Weikel or Vergie Keatly, and none of them were prospects for the sale of this car. In fact, neither Ellison nor Keatly were prospects for the sale of any car. Weikel seemed to be a prospect for a new car at a later date. However, the last time this subject was discussed between Holt and Weikel was on the Athens Road about 11 o'clock a. m., and at least five hours before the accident (R. 80 and 89). However, by talking sale to Weikel about 11 a. m., during a drinking party, Holt could not turn the whole day's activities into acts in the furtherance of petitioner's business.

The witness Vergie Keatly was examined as a witness for McElroy, and testified that just before the party left the DeLuxe Sandwich Shop (about 1 o'clock, R. 110), that Ellison asked one of the girls there to allow her

little boy to go along and that Ellison said, "O, hell, let him go, we won't be long, we are just trying the car out, demonstrating" (R. 42). Petitioner objected to this answer, and the court ruled that it could have no effect whatever on petitioner, and was not admissible to prove the fact of agency (R. 145-146). However, this statement was denied by Ellison (R. 79 and 83), and was likewise denied by Ann Blevins (R. 108-107), and is plainly contradicted by the admitted facts and circumstances. If there is one thing clearly and conclusively proved in this case, it is that this Plymouth car was not being demonstrated and had not been demonstrated to anyone on that day and that no effort whatever had been made by Holt to sell this car to anyone.

The sole object and purpose of this journey, lasting from 9 a. m., until 4 p. m., was to drink liquor and to joy ride. We quote from the evidence of Frank Ellison (R. 80 and 81):

> "Q. 84. Now, Mr. Ellison, what was the purpose of all this riding that you men were doing from nine o'clock in the morning until about two-thirty that afternoon? What was your purpose in it?
>
> "A. Well, we were just out to drink, that was all, just drinking, didn't have any particular purpose."

Also see evidence of Herbert Holt (R. 121):

> "Q. 64. Now, during this trip that you took with Ellison and Weikel, during that day from nine o'clock in the morning until the time this accident occurred, just what was your purpose in riding around with these men?
>
> A. To drink whiskey.
>
> Q. 65. Was that the sole purpose?
>
> A. That was all."

Also see evidence of Robert Weikel (R. 92):

> "Q. 52. Where were you headed when this accident happened, where were you going?

A. Really, I don't know where.
Q. 53. If you were sober, why didn't you know?
A. I didn't ask any questions. I was just riding.
Q. 54. Just joy-riding?
A. Yes, sir."

Ellison and Weikel testified as witnesses for McElroy and the United States of America, and Hanna later adopted this testimony (R. 144). No one testified to the contrary. Plaintiffs are bound by this testimony. In fact there is nothing in the record to contradict it. All other facts and circumstances corroborate it.

There is no evidence in the entire record showing or tending to show that at the time of the accident Ellison was operating this car as the agent for petitioner or on petitioner's business. What business, we ask? How were petitioner's interests being advanced by this trip? What possible benefit was petitioner expected to derive from the trip? The questions answer themselves. We may certainly assume one thing, and that is this—if petitioner had known the use to which this car was being put, that it was being operated not by a prospective purchaser, but by a drunken driver, whose operator's license had been revoked on account of drunken driving, he would not have approved of it, and it would never have occurred to him that this thing was being done for his benefit, and in the furtherance of his business.

We submit that the *primary purpose* of the entire trip from nine a. m. to four p. m. was to joy-ride and drink liquor. The sales talk between Holt and Weikel at nine a. m. and 11 a. m. was *incidental* to the main purpose of the joy-riding and drinking liquor, and, therefore, we do not believe it can be said that Holt was on the business of petitioner at any time after he met Ellison and Weikel and the drinking began. From that time on, the joy-riding, the

women and the liquor were uppermost in Holt's mind, his master's business was forgotten.

However, assuming that when Holt talked sales to Weikel at nine a. m. and eleven a. m. he was acting on the business of petitioner, and that petitioner would have been liable for Holt's acts committed at these times, certainly after eleven a. m. Holt abandoned petitioner's business entirely and completely and thereafter it cannot be said that Holt was acting as the agent for petitioner and within the scope of his employment.

The authorities agree that petitioner's liability depends upon whether Ellison was his servant or agent and engaged upon his business *at the time the negligent act occurred.*

The trip from Princeton to the Athens Road about 10:30 or 11 o'clock was not taken for the purpose of discussing the sale of the car, this trip was undertaken at the request of Ellison and Weikel to permit them to drink liquor (R. 119).

The trip from the DeLuxe Sandwich Shop to Gooch Harris' beer joint was certainly not taken for any purpose connected with petitioner's business. The sole purpose of this trip was to enable Weikel, Ellison and Vergie Keatly to secure a cabin and have a drinking party. Holt was not consulted in regard to this trip, and he knew nothing whatever about it.

In their brief filed in the Circuit Court of Appeals the plaintiff made much of the fact that Holt, Weikel and Ellison became intoxicated, the brief going on to say that "many business transactions are closed with the aid of whiskey. Conviviality and cordiality are prime requisites of salesmanship."

We merely wish to point out that all of the liquor consumed by Holt, Ellison and Weikel on the day of the accident was furnished and paid for by Weikel. Therefore, we

do not have a case of the salesman using liquor to sell a car to a prospect; here the prospect was entertaining the salesman.

(1) Authorities Relied on by Petitioner on Question of Whether Ellison Was Operating the Car as Agent for and on Business of Petitioner.

We will first discuss the West Virginia cases bearing on this question.

We call the court's particular attention to the case of *Meyn* v. *Dulaney-Miller Auto Company,* 118 W. Va. 545, 191 S. E. 558, decided by the Supreme Court of Appeals of West Virginia, on June 23, 1937. This was an action of trespass on the case instituted by Meyn against Dulaney-Miller Auto Company, a Corporation, and Bart Scanlon, to recover damages for personal injury growing out of an automobile accident. The plaintiff was struck and injured by an automobile driven by the defendant, Scanlon, and owned by defendant, Dulaney-Miller Auto Company. The facts as stated in the court's opinion are as follows:

> "The Dulaney Company was engaged in the business of selling automobiles, new and used; Scanlon was in charge of, and also a salesman in, the company's used car department. He was paid a salary of $100.00 per month to operate the department, with commissions of 2 per cent on sales made by him personally and 1 per cent on sales made by salesmen under him. He could sell used cars, including the car in which he was riding at the time of the accident, at all times of the day or night, although his regular hours of employment were between 8 a. m. and 9 p. m. The used car department, according to custom, closed at 9 p. m. This department was located at the defendant company's regular place of business at Twenty-third and Market Streets, a number of blocks directly south of the place of the accident. *Scanlon had the right to use the car in question in going to, and returning from, his work. He also had*

the right to use it and other used cars for his company's business and his own pleasure. However, he was expected to purchase his own gasoline when he used such cars for pleasure. At the time of the accident, Scanlon lived in the 'Out the Pike' section of Wheeling, a residential section some distance from the defendant company's location, the place of accident being on the route between the company's place of business and Scanlon's home.

On the night in question, Scanlon used the car to attend a Shriners' picnic at Wheeling Park. From Wheeling Park he took two young women, whom he met there, to their homes in Martin's Ferry, and then returned to the Washington Restaurant in Wheeling, which restaurant is situated on Market Street a short distance south of the place of accident. He left the restaurant about 11:30 p. m. and drove south on Market Street in a direction opposite from his home to the street in front of the Dulaney Company's place of business for the purpose of assuring himself that the used cars belonging to the company had been removed from the street to their proper place for storage for the night. While there, he did not leave the car, but satisfied himself by a view from the driver's seat. After he had assured himself, he drove north on Market Street toward his home, and incidentally, to the place of accident."

The court held that at the time of the accident in question that Scanlon was acting within the scope of his employment, and that the Dulaney-Miller Auto Company was liable to the plaintiff. However, in the course of its opinion, the court said:

"We need not restate in detail the circumstances bearing upon Scanlon's relation to the company's business. The jury having decided that, at the time of the accident, Scanlon was acting within the scope of his employment, we are now concerned with the law of the case. Ordinarily, the owner of an automobile is not liable for injuries caused by a servant, while operating the car on his own business or pleasure, though the servant had the owner's consent. *This was Scanlon's*

exact situation when he went to the Shriner's picnic at Wheeling Park, and then took the young women home. The fact that he had a right to sell the automobile at the picnic, and while there was incidentally advertising the company's business, did not bring him within the scope of his employment. He was on a 'frolic of his own'."

We call the court's particular attention to this case. It will be observed in the case that Scanlon had the right to use the car in question in going to and returning from his work, and the right to use it and other used cars for his company's business and his own pleasure, and was paid a salary. Yet, the court held that in attending the Shriners' picnic at Wheeling Park, and later taking the young women home, that Scanlon was on a "frolic of his own", although while at the picnic he was incidentally advertising the company's business and had a right to sell the car had he found a purchaser.

In the principal case, Herbert Holt had no regular working hours, was not paid a salary, did not have the right to use petitioner's car for his own pleasure or convenience, and did not have a right to drive it to and from his home. His authority was considerably more restricted than Scanlon's authority, and at the time the accident occurred, Holt was acting in disobedience of petitioner's orders.

We also call the court's attention to the case of *Ritter* v. *Hicks*, 102 W. Va. 541, 135 S. E. 601. This was an action by Alice Ritter, administratrix of the estate of James E. Ritter, against H. W. Hicks, the owner of a car, and I. R. Hicks, the operator thereof, for the death of plaintiff's decedent, which occurred when said automobile struck and killed plaintiff's decedent. The facts in this case were as follows:

About 8 p. m., of December 23, 1924, Mr. Ritter was struck by an automobile on a street in the city of Bluefield. These injuries caused his death. The automobile was being driven

by I. R. Hicks, who was the son of H. W. Hicks. H. W. Hicks lived at Pocahontas, Virginia, where he dealt in automobiles. He was also the sole proprietor of an automobile agency at Keystone, W. Va. I. R. Hicks was the manager and in full control of the Keystone business. *It was his habit to use the cars under his charge for his own pleasure and convenience. This practice was known to and seemingly approved by his father.*

On the night of the accident, I. R. Hicks was driving for his own pleasure a heavy Lincoln sedan kept at the Keystone agency for demonstration and sale. The jury returned a verdict against both H. W. and I. R. Hicks, and both appealed. In reversing the judgment against H. W. Hicks, the Supreme Court of Appeals of West Virginia held that he was not liable for the act of I. R. Hicks, either under the family purpose doctrine or under the doctrine of respondeat superior. The court said:

> "The authorities are in accordance that the owner of a car is not responsible in a case where his agent or employee uses the car when off duty, for his own pleasure, and not in the business of his employer."

It will be observed that in the case just referred to, I. R. Hicks was the manager of the Keystone agency, and had the right to use the cars of H. W. Hicks on the business of the company, *or for his own pleasure and convenience. Apparently his right to use the cars was in no way restricted.* Yet the court held that he was not acting within the scope of his employment at the time he struck and killed Ritter. The principal case is much stronger from the petitioner's standpoint. In the principal case, Holt was employed on a purely commission basis. He worked when he pleased. He did not have the right to use petitioner's cars for his own pleasure or convenience. His use of the car was limited strictly to demonstration purposes.

We also call the court's attention to the case of *Jenkins* v. *Spitler,* 120 W. Va. 514, 199 S. E. 368. In this case, Helen M. Jenkins brought suit against E. Paul Spitler, Otis Perry, and Herbert M. Campbell and Howard B. Campbell, trading and doing business as Campbell Brothers, to recover damages for personal injuries caused by a collision between the automobile in which she was riding and the automobile owned by the defendants, Campbell Brothers, driven by defendant Otis Perry, in which the other defendant, Spitler, was riding. Spitler did not appeal. Judgment was entered on a jury verdict against the two Campbells, trading and doing business as aforesaid, and Otis Perry. Campbell Brothers prosecute error. The facts were as follows:

The Campbells were partners engaged in the automobile business in Nicholas County. Spitler, manager of one of their garages, with general authority to sell their cars, was loaned a used car to visit his sick wife at Staunton, Virginia. H. M. Campbell, at Spitler's request, gave the latter a specific sales price on the car, if, while on the trip, he should happen to get a chance to sell it; and H. B. Campbell, the other partner, helped Spitler fasten on the car dealer's license plates and also handed to him a small package to be delivered several miles beyond Staunton. Spitler drove the car to Richwood, West Virginia, where he induced Perry to join him on the trip. Perry drove to a point on the Midland Trail about 60 miles away where the loaned car collided with a car occupied by plaintiff and her husband, and the plaintiff was injured.

In this case, the Supreme Court of Appeals of West Virginia held that Campbell Brothers were not liable for the negligent operation of the car, and the court cited with approval the case of *Meyn* v. *Dulaney-Miller Auto Company,* 118 W. Va. 545, 191 S. E. 558, heretofore referred to.

Syllabus 1 of the case of *Jenkins* v. *Spitler, supra,* reads as follows:

> "The owner of an automobile is not liable for injuries caused by the negligence of his employee, while permissively operating the car on his own business or pleasure, though he had the right to sell the car, while so driving it, and was incidentally charged with a mission for his employer's benefit."

In the case of *Coates* v. *Auto Sales Company,* 106 W. Va. 380, 145 S. E. 644, the plaintiff sued Auto Sales Company to recover for personal injuries received by plaintiff when struck by an automobile owned by Auto Sales Company, and operated by William Mitchem, an employee of Auto Sales Company. The facts of the case are as follows:

Prior to July 1st, 1925, the Auto Sales Company owned and operated in the City of Wheeling an automobile business which, on that date, it sold and delivered to William Nolan and Gordon Roberts. William Mitchem, nineteen years of age, had been staying around the place of business for five or six weeks, intermittently performing service for the defendant for which he received such compensation as it saw fit to allow him. He slept in the building used in the conduct of the business. While the merchandise embraced in the sale was being inventoried on the day of its delivery, Mitchem assisted in the loading of a truck of the defendant with certain materials which had not been sold. Late in the afternoon when the purchasers had assumed charge of the business, W. L. Smith, president of defendant, requested Mitchem to drive the truck to another place of business of the defendant in Wheeling the following morning. The loading of the truck was completed in the evening by Mitchem and Corbett Howell, who had been serving the defendant as a night employee at the plant. H. D. Evans, who had been the local manager of the business for the de-

fendant, returned in the evening to do some clerical work for it and to place its books of account in the loaded truck. About 11 o'clock in the night Mitchem took him to his home, nearby, in an automobile of the defendant. Later, upon his own initiative and with the knowledge of Corbett Howell, Mitchem drove the car to his father's home, several miles distant, for the purpose, as he claims, of returning a small batch of tools belonging to him and which he had been using in the service of the defendant. Enroute on his return he seriously injured the plaintiff by the negligent operation of the car.

The court held that the Auto Sales Company was not responsible for Mitchem's conduct in injuring plaintiff because Mitchem was *off duty* at the time of the accident. In the course of its opinion, the court said:

> "The master is not liable for the act of the servant resulting in injury to another, if committed at a time when the servant is off duty * * * There can be no question of the fact that the duties of Michem for the day had ended before he started on the trip for the purpose, as he says, of carrying his tools home. The practice testified to by him of using the cars of the defendant without its express authorization does not render it liable for his negligence of which the plaintiff complains. * * *"
>
> There is no merit in the position of the plaintiff that Mitchem was in the service of the defendant while making the trip, because of the obligation of the Auto Sales Company to return the tools. Mitchem was not at the time carrying out any instructions of the defendant, and admits that he could have taken the tools the next morning on the truck to its place of business and thence on the street car to his home."

We also call attention to the case of *Don Shrimplin* v. *Simmons Auto Company* (W. Va.), 9 S. E. (2) 49. This case is not in point on the facts, but in line with later *West Virginia* cases, indicates a definite trend to limit the liability

of an automobile dealer for acts of a salesman operating the dealer's car, and the reasoning of the court is applicable to the principal case.

In the *Shrimplin* case above referred to, plaintiff sued the defendant, an automobile dealer, for personal injuries received by plaintiff while riding as a guest in an automobile owned by defendant and driven by one Chenoweth, defendant's salesman. The car operated by Chenoweth collided with another car at an intersection, and plaintiff sued defendant for his resulting injuries. In this case Chenoweth received compensation at $12.00 per week, and 3% commission on sales. He was permitted to use cars owned by defendant, and had "broad authority" with respect to hunting up sales prospects and negotiating sales to persons already contacted by defendant. On the morning of the accident, Chenoweth left Spencer, W. Va., for the purpose of seeing a prospect near Arnoldsburg, which was 15 miles from Spencer. When Chenoweth reached Arnoldsburg, he decided not to see this prospect, but that he would see another prospect. Later Chenoweth reached plaintiff's lumber camp and attempted to sell or trade plaintiff the car operated by Chenoweth. Chenoweth then suggested that plaintiff ride to Spencer with him so that they might discuss the trade. Plaintiff accepted. On the trip back to Spencer, the trade was discussed, but not consummated. It was not thereafter discussed. After lunch, Chenoweth, accompanied by plaintiff, called on a Miss Price, another prospect, and she was taken into the car, and the three went on a trip lasting several hours, during which trip Miss Price drove the car. The accident occurred on this trip. In holding that the plaintiff was not entitled to recover from defendant, the court said:

> "Clearly, in demonstrating and attempting to sell this car to Miss Price, Chenoweth was not then engaged

in any effort to trade the same car to the plaintiff, and there would seem to be no basis upon which it can reasonably be contended that in carrying the plaintiff over a route entirely different from that to which his earlier invitation referred the liability of the defendant for the exercise of due care still continued. True, Chenoweth was continuously in the employ of the defendant, but he was not exercising that employment during the afternoon in any effort to make a sale to or trade with the plaintiff. *We think there must be some limitation upon the authority of a servant, even while within the scope of his employment, in inviting people to ride in an automobile under his control,* when such invitation has no connection with the business in which he is then engaged. *An invitation, proper at the time made, cannot be held to continue long after the consummation of the purpose which prompted it.* Any new invitation must rest upon the circumstances then existing. We are of opinion that when the plaintiff accompanied Chenoweth during the afternoon of May 26, when he was engaged in business of his company with which plaintiff was in no way associated, he no longer had the protection contemplated by the original invitation, that of the obligation to exercise due care; and further that the defendant could only be held liable where there was a showing of reckless, wanton, wilful negligence. There is no such showing on this record, nor any contention that there was that character of negligence, and we, therefore, *hold that the trial court was warranted in striking out the plaintiff's evidence and directing a verdict for the defendant upon the ground that, on this record, no liability rested upon the defendant for the conduct of Chenoweth, even though there may have been a lack of care on his part.*"

In the case just referred to, plaintiff was not permitted to recover because at the time of the accident, plaintiff's permission to ride in defendant's car had no connection with defendant's business, and the interests of defendant were not being promoted in any way by plaintiff's presence in the

car. And this was true, even though Chenoweth was acting within the scope of his employment at the time of the accident in demonstrating the car to Miss Price, and that a few hours previously the car had been demonstrated to plaintiff.

The most recent case decided by the Supreme Court of Appeals of West Virginia, which bears on the question under consideration is the case of *George H. Lacewell, Admr.* v. *J. G. Lampkin, et al.* This case was decided on March 3, 1941, and is not yet reported. The facts are as follows:

On the morning of June 1st, 1939, between 8:30 and 9 o'clock, plaintiff's decedent, a young lady who taught in the public schools at Grant Town, a distance of approximately ten miles from Fairmont, was waiting at 26 Pennsylvania Avenue at Fairmont to be driven to Grant Town where her pupils were to assemble for a picnic commencing at 10 o'clock. Her expected means of transportation failed to materialize and she hailed Loenza Nunn, a friend, who was passing in a Packard sedan, and whom she had known for several years, and asked him to drive her to Grant Town. Nunn was an embalming apprentice in the undertaking establishment of defendant Lampkin, receiving no regular compensation and being given two or three dollars a week for spending money. He speaks of his employment as working as an assistant and states that he drove automobiles for Lampkin "in funerals and other business". Lampkin says that part of his duties were to keep the passenger cars of which there were four, clean and supplied with gasoline.

Nunn advised plaintiff's decedent that he would be obliged to go to the undertaking establishment and get the permission of Lampkin, he then being engaged in having the tank of the car he was driving filled with gasoline pursuant to Lampkin's definite instructions. Upon reaching the place of business, Nunn was told by Lampkin that it would be

"all right" to take the two teachers to Grant Town, but he, Lampkin, desired to use the car Nunn had been driving, so that the Grant Town trip should be made in a seven passenger Packard sedan also owned by Lampkin. Nunn took the large Packard and went at once to fulfill his promise. Nunn's passengers purchased two gallons of gasoline, the estimated amount to fuel the Packard to Grant Town and return, and proceeded on the way to Grant Town. On the trip to Grant Town, he was involved in a collision, and plaintiff's decedent was killed. An action was then brought against Lampkin, the owner of the car, to recover for the death of plaintiff's decedent. The Supreme Court of Appeals of West Virginia held that Lampkin, the owner of the car, was not liable on the doctrine of respondeat superior. The court said that although Nunn was generally employed as the servant of Lampkin, that he was not acting within the scope of his employment in driving plaintiff's decedent to Grant Town, and hence that Lampkin was not responsible for Nunn's negligent act causing the death of plaintiff's decedent.

There are a number of cases from other jurisdictions very similar upon the facts to the case under consideration, which we will refer to briefly.

Syllabus 1:

> "Whether employer was liable for injuries caused by negligent driving of demonstration car by employee selling cars on commission depended on whether negligent act of employee was within scope of employment."

Syllabus 2:

> "Act of servant, to fall within scope of employment, must be in prosecution of master's business or incident to duties of servant, or connected therewith, or necessary to accomplish purpose of employment."

Syllabus 3:

"Negligent act of automobile salesman, paid on commission basis, in driving demonstration car while intoxicated, causing injuries, held not within scope of employment, where salesman was making Sunday morning trip on private mission, with no purpose of soliciting business for employer."

Grier v. *Grier, et al.* (N. C.), 135 S. E. 852.

Syllabus 1:

"Evidence held not to show that automobile salesman was acting within 'scope of employment' when he struck pedestrian while driving company automobile late at night at end of drinking party after leaving saloon where he had incidentally interviewed bartender about buying car."

Price v. *Shorewood Motors, Inc.* (Wis.), 251 N. W. 244.

Syllabus 2:

"An employer was not liable under doctrine of respondeat superior for death resulting from collision between automobile in which deceased was riding and automobile of employer in custody of its agent which was being negligently driven by a friend of agent at agent's request after they had spent the night in search of entertainment for purposes purely personal to themselves."

Syllabus 3:

"Even if agent had authority to use employer's automobile on frolics of his own, agent's status would be that of an ordinary bailee for whose negligence the employer would not be liable."

Syllabus 4:

"An employer was not liable under doctrine of respondeat superior for death sustained in collision between automobile in which deceased was riding and

automobile which was driv*ing* by a friend of employer's agent at agent's request while agent slept or lay in a drunken stupor therein after a night spent in search of entertainment, on theory that agent was going to a certain town to have damaged fender repaired, where to do so would require that such trip be entirely isolated from the activities of agent and his friend during the entire night."

McNeal, et al. v. *Home Ins. Co., et al.* (Texas), 112 S. W. (2) 339.

Syllabus 5:

"Where an automobile salesman, driving a car which his employers furnished him for his use in making sales, demonstrated the car to a prospective customer, and after leaving the customer's home took the customer's friends to their home in a neighboring city, where a pedestrian was run down by car after the salesman turned to place to buy cigarettes, he was not then engaged in the work of his employer, but in the pursuit of his own affairs."

Moore v. *P. J. Downs Co., et al.* (Minn.), 185 N. W. 395.

Syllabus 3:

"That driver of dealer's automobile at time of collision was one of dealer's salesmen, who had authority to use automobile while in his possession in furtherance of dealer's business, held not to render dealer liable for salesman's negligence, where at time of accident salesman was using automobile for his personal pleasure."

D. S. Etheridge Co. v. *Peterson* (Tenn.), 90 S. W. (2) 957.

Syllabus 3:

"Operation of automobile by salesman on his way to his residence for purpose of bringing his wife into the city, though within period of working hours, held as matter of law not within scope of salesman's employ-

ment by motor car company, so as to render company liable for injuries alleged to have resulted from salesman's negligent driving."

McCormack Bros. Motor Car Co. v. *Holland*, 118 So. 387.

Syllabus 2:

"One seeking recovery against an automobile owner for injury caused by negligence of the chauffeur must not only establish the relationship of master and servant between the owner and the chauffeur, but, further, that the chauffeur at the time of the accident was about his master's business, and was acting within the scope of his employment."

Syllabus 3:

"Where a chauffeur, under order of his master to transport another servant to a certain place on a visit and bring her back, reached the place at 3 o'clock and called for her at 5 o'clock, the master was not liable for injuries caused by negligence of the chauffeur in the interim, while he was joy-riding with a friend, and was neither going for nor returning with his passenger."

Kidd v. *DeWitt* (Va.), 105 S. E. 124.

Syllabus 2:

"Employer held not liable for negligence of its truck driver who deviated abruptly from direct return route to factory and caused damage for which recovery was sought twenty blocks distant from his route while on an errand of his own, since relationship of master and servant was suspended while truck driver was engaged in his own business."

Virginia Ice & Freezing Corporation v. *Coffin* (Va.), 184 S. E. 214.

Syllabus 1:

"Where servant is doing his own work or that of third person, master is not liable for his negligence."

Syllabus 2:

"Master held not liable for servant's negligence while on personal errand, though driving automobile furnished by master.

"The employee was a mine superintendent, and the automobile was furnished primarily to enable him to travel between the different mines in the performance of his duty, but no restrictions were placed upon its use. At the time of the accident, he was driving to a distant city to visit his family."

Elkhorn Piney Coal Mining Co. v. *Hazelett* (C. C. A., 6th Cir.), 62 F. (2d) 137.

Syllabus 3:

"Where collector, receiving mileage allowance for operating own automobile between towns on itinerary, customarily with employer's knowledge returned to home for week-ends without receiving mileage allowance therefor, employer held not liable for collector's alleged negligent operation of automobile while returning from town in which he had finished employer's business to home for week-end."

Syllabus 4:

"To establish liability under respondeat superior doctrine, it must be shown that plaintiff was injured by alleged wrongdoer's negligence, that relation of master and servant existed between one sought to be charged and alleged wrongdoer, that neglect of servant was in course of employment or in scope of authority, and that servant was engaged in master's work and was about master's business at time of injury."

P. F. Collier & Son Distributing Corp. v. *Drinkwater* (C. C. A., 4th Cir.), 81 F. (2d) 200.

Also see *Denton* v. *Yazoo & M. V. R. Co., et al.*, 284 U. S. 305, 308, 52 S. Ct. 141, 76 L. Ed. 310; *The Standard Oil Company* v. *Anderson*, 212 U. S. 215, 221, 29 S. Ct. 252, 254, 53 L. Ed. 480.

(2) Authorities Relied on by Plaintiffs on Question of Whether Ellison was Operating the Car as Agent for and on Behalf of Petitioner.

At the trial in the lower court appellees apparently relied mainly on the following West Virginia cases: *Cochran* v. *Michaels*, 110 W. Va. 127, 157 S. E. 173; *Shahan* v. *Jones*, 115 W. Va. 749, 177 S. E. 774; *Miller* v. *Douglas*, (W. Va.) 5 S. E. (2) 799. We believe we are justified in saying that the case of *Cochran* v. *Michaels, supra*, is principally relied on by appellees, and for that reason, we shall discuss it fully.

In this case, plaintiff was injured by an automobile owned by defendant and driven by a salesman employed by defendant for the purpose of selling used cars. The driver was employed to sell used cars at the price and on the terms fixed by defendant, who was in the garage business at Fairmont. The driver was authorized by defendant to go anywhere within reason, on his own initiative in search of a purchaser, subject to the order that he should return the car to the garage by 8 p. m. He was privileged to "pick up" his friends on his trips. At the time of the accident, the driver was taking a friend with three other persons to Fairmont to consult a doctor. The friend lived at Everson, which is about 7 miles from Fairmont. None of the passengers were prospects for a sale. Under the circumstances, the defendant contended that the relationship of master and servant between him and the driver did not exist at the time of the accident, and that consequently he was not liable for plaintiff's injuries. However, the court held that at the time of the accident that the driver was acting within the scope of his employment and that the defendant was liable for his negligent act in injuring plaintiff. In the course of its opinion the court said:

> "It is apparent that at the time of the accident the driver was not engaged directly in defendant's busi-

ness, in a narrow and restricted sense; but, as we have seen from Mechem, the rule of respondeat superior is not limited to such a restriction. * * * It may be conceded that the driver did not even intend to further the master's business by the course he was pursuing at that time; but his mental attitude, alone, is not controlling. * * * The real test is 'in the relation which the act done bears to the employment'. * * * Much of the driver's information as to prospective purchasers necessarily came through his friends and acquaintances. One purpose of his 'roving commission' was evidently to allow him to visit at will among his friends and acquaintances, in search of this information. *It is reasonable that the defendant had this in mind in giving the driver permission to pick up friends.* A friend picked up became an eager informant as well as a partisan of the driver, and the interest of the defendant was thus promoted. Authority to pick up friends impliedly included permission for the driver to put aside momentarily the direct search for purchasers in order to serve the friends. It is a common trait of servants to usurp authority in the absence of the master. Knowledge of this trait is chargeable to the defendant, as an employer of labor. Mere abuse of authority by the servant, does not sever the relation of master and servant. * * * It is not necessary that the defendant should have anticipated the exact circumstances surrounding this accident. It is sufficient if it was probable that the driver would at times exceed his express authority and carry a friend (a greater or less distance) solely as an accommodation to the friend. * * * *We are of opinion that such an act of accommodation was a natural consequence of the broad powers conferred on the driver, and that the defendant should have anticipated that at some time some place the driver would do just that thing. If so, the act which occasioned the plaintiff's injury was within the scope of the driver's employment, and the defendant is responsible for that act.* As there was no conflict in the evidence on this subject, it was a question of law for the trial court, and should not have been submitted to

> the jury as was done by several instructions given on behalf of defendant. This was error and warranted the court in setting aside the verdict."

There are three very good reasons why the case just referred to is not controlling. First, it is not in point on the facts; second, it has been impliedly overruled by later West Virginia cases; third, it is wrong on principle. We shall discuss these propositions in order:

COCHRAN V. MICHAELS IS NOT IN POINT ON THE FACTS.

In *Cochran* v. *Michaels,* the salesman had authority without permission to go anywhere within reason on his own initiative in search of a purchaser, subject to the order that he should return the car to the garage by 8 p. m. The salesman was authorized to "pick up" his friends on these trips. He had a "roving commission". The court said that "authority to pick up friends included permission for the driver to put aside momentarily the direct search for purchasers in order to serve his friends." Certainly Herbert Holt had no such authority. Holt, testifying as a witness for McElroy and the United States, which evidence was later adopted by Hanna, testified that he always obtained petitioner's permission before using his cars; that he had authority to use them only for business purposes and no right to use them for his own personal pleasures and convenience; that he did not even drive the cars to and from his home; that he had the right to permit prospective purchasers to drive the cars, but that he did not have authority to allow other persons to drive them. At the time this accident occurred, Holt was supposed to be at Hiawatha demonstrating this car to a prospective purchaser, and when he fell in with Ellison and Weikel and went off on a drunken spree, he was acting in *disobedience* of express orders of petitioner. Therefore, it will be seen that the broad powers

conferred on the salesman in the case of *Cochran* v. *Michaels, supra,* was the sole basis for the decision in that case. The court, in that case, said:

> "We are of opinion that such an act of accommodation was a natural consequence of the broad powers conferred on the driver, and that the defendant should have anticipated that at some time some place the driver would do just that thing."

Holt as petitioner's salesman possessed no such authority, and this fact alone clearly distinguishes the principal case from the case of *Cochran* v. *Michaels.*

COCHRAN V. MICHAELS HAS BEEN IMPLIEDLY OVERRULED BY LATER WEST VIRGINIA CASES.

We submit that the case of *Cochran* v. *Michaels* has been impliedly overruled by at least two later West Virginia cases; namely, *Meyn* v. *Dulaney-Miller Auto Company,* 118 W. Va. 545, 191 S. E. 558, and *Jenkins* v. *Spitler,* 120 W. Va. 514, 199 S. E. 368. In the case of *Meyn* v. *Dulaney-Miller Auto Company, supra,* the employee, who was manager of defendant's used car department, had authority to use the car in question in going to and returning from his work, and the right to use it and other used cars for the company's business and his own pleasure. However, the court said in that case:

> "We need not restate in detail the circumstances bearing upon Scanlon's relation to the company's business. The jury having decided that, at the time of the accident, Scanlon was acting within the scope of his employment, we are not concerned with the law of the case. Ordinarily, the owner of an automobile is not liable for injuries caused by a servant, while operating the car on his own business or pleasure, though the servant had the owner's consent. *This was Scanlon's exact situation when he went to the Shriner's*

> *picnic at Wheeling Park, and then took the young woman home. The fact that he had a right to sell the automobile at the picnic, and while there was incidentally advertising the company's business, did not bring him within the scope of his employment.* He was on a 'frolic of his own'."

Does not this statement indicate clearly that the West Virginia court has forsaken the rule laid down in *Cochran* v. *Michaels?* We also call attention to the case of *Jenkins* v. *Spitler,* 120 W. Va. 514, 199 S. E. 368, Syl. 1 of which reads as follows:

> "The owner of an automobile is not liable for injuries caused by the negligence of his employee, while permissively operating the car on his own business or pleasure, though he had the right to sell the car, while so driving it, and was incidentally charged with a mission for his employer's benefit."

In the principal case, petitioner authorized Holt to drive the car to Hiawatha, but Holt disobeyed instructions and went on a frolic of his own.

Cochran v. Michaels is Wrong on Principle.

According to the cases heretofore cited and the overwhelming weight of authority, *Cochran* v. *Michaels* is wrong on principle, which probably accounts for the fact that the West Virginia court has practically ignored it in subsequent decisions.

Appellees also rely upon the case of *Shahan* v. *Jones,* 115 W. Va. 749, 177 S. E. 774. In this case, plaintiff, an infant, recovered a judgment against defendant and one Eckels for personal injuries sustained by her when struck by an automobile belonging to Jones and operated by Eckels. Defendant manufactured and sold granite and marble monuments. Eckels was at the time of the accident in de-

fendant's employ as a traveling salesman, selling the finished products of the business. The car was used by Eckels when necessary in covering his territory. Eckels says that he was at the time of the accident, and had been for several days prior thereto off duty on a vacation, using the car for his own benefit, and was at the time returning from a trip to Akron, Ohio, to visit his daughter, and to sell or deliver to purchasers books of poetry written by himself. Eckels admitted that the territorial extent of his employment with Jones was unlimited. W. B. Gum, Chief of Police, testified that Eckels told him at the scene of the accident and a short time thereafter that he "was traveling for the Jones Marble Works at Weston". Sanford A. Shahan testified that he attempted negotiations with defendant to settled the claim for damages on two occasions prior to the institution of suit and that defendant did not on either occasion contend that Eckels was driving the car on his own account at the time of the accident. In this case, the court held that it was for the jury to say whether at the time of the accident Eckels was acting within the scope of his employment.

We submit that the case just referred to is not in point. In that case, Eckels had a "roving commission" to use defendant's car in soliciting business for defendant. In the principal case, Holt did not have a "roving commission". It was his practice and custom to secure petitioner's permission to use cars for demonstration purposes, and when the demonstration was ended to return them to petitioner's place of business. Although the opinion in the case of *Shahan* v. *Jones* does not so state, it is quite evident that Eckels, the salesman, had the right to use the car for his own personal pleasure and convenience, and in any manner that he desired. This is not true in the principal case. It also appears in the case of *Shahan* v. *Jones* that at the time of the accident Eckels stated that he was traveling

for the Jones Marble Works at Weston and it further appears that when the father of the plaintiff was negotiating with Jones for a settlement of the claim, that Jones did not at that time contend that Eckels was driving the car on his own account. Therefore, we submit that *Shahan* v. *Jones* is not authority for the appellees in this case, and we further submit that the rule laid down in the *Shahan* v. *Jones* case has been modified by the later cases of *Meyn* v. *Dulaney-Miller Auto Company* and *Jenkins* v. *Spitler, supra.*

We understand that appellees also rely on the case of *Miller* v. *Douglas* (W. Va.), 5 S. E. (2) 799. This case is not in point. It apparently holds that a prospective purchaser driving a car for demonstration purposes and unaccompanied by the owner or a salesman, is an agent of the owner while so doing and that the owner is liable for the prospective buyer's negligence in striking and injuring a third party. Conceding that this is the holding of the court in that case, it is quite clear that the case is not in point. In the principal case, Ellison was not interested in purchasing the car, and was not trying it out or demonstrating it, either for his own benefit or for the benefit of any other person. He was merely driving a party of drunks on a joy-ride. In fact, he was not driving it with the knowledge or consent of Herbert Holt, petitioner's employee, who was entrusted with the use of the car. The case is not at all in point.

If this case does in fact hold that a prospective purchaser driving a car for demonstration purposes unaccompanied by the owner or his salesman is an agent of the owner, and that the owner is liable for the prospective purchaser's negligence, then it certainly is a revolutionary doctrine and is contrary to all the cases we have read on the subject. The correct rule is laid down in *Moseley* v. *Kimble* (Ill.), 178 N. E. 66; *Saums* v. *Parfet,* 258 N. W. 235.

In the cases of *Cochran* v. *Michaels, Shahan* v. *Jones* and *Miller* v. *Douglas, supra,* the employee or agent at the time of the accident was operating the master's car with the *express consent* of the master. In the principal case, at the time the accident occurred, Herbert Holt was operating the car in direct *disobedience* to petitioner's instructions, which were to go to Hiawatha and attempt to sell the car to Hale.

B.

The evidence is not sufficient to justify the jury in finding that at the time of the accident Ellison was operating petitioner's car with the knowledge and consent of Herbert Holt.

Practically all of the cases heretofore discussed involved accidents occurring when salesmen for automobile dealers or other employees were *themselves* operating the owner's car at the time of the accident. However, in this case, petitioner's car was not being operated by Holt, his employee, but was being operated by Frank Ellison, without the knowledge or consent of either petitioner or Holt. It is true that when the party was at the West Virginia Filling Station that Holt asked Ellison to drive. However, Ellison refused, stating that his operator's license had been revoked. Ellison then suggested that Weikel drive. Thereafter, Holt did not request Ellison to drive, and it is entirely clear that at the time of the accident Ellison was operating the car without the knowledge or consent of Holt. How does this effect the liability of petitioner?

We submit that if Holt himself had been driving that petitioner would not have been liable for the resulting damage, for the reason that Holt was not acting within the scope of his employment. For much stronger reasons petitioner should not be liable when Ellison, a total stranger, took the car over at a time when Holt was badly intoxicated; in fact.

unconscious, and without either the knowledge or consent of Holt.

The cases are in hopeless conflict on the question of the master's liability for the negligence of a third person who is operating the master's car with the permission and in the presence of the master's servant. These opposing views are very well illustrated by the holdings of the highest courts of Massachusetts and New York.

> "Where it was not within scope of truck driver's authority to permit any one to ride on or operate the truck, owner thereof was not responsible for negligence of an intruder, permitted by chauffeur to ride and drive truck, and whose negligence in driving on left of street caused collision with plaintiff's automobile."
>
> *Butler* v. *Mechanics' Iron Foundry Company*, (Mass.) 156 N. E. 720, Syl. 1.

> "Where employer sent out a motor truck with driver and salesman to deliver merchandise, and driver without authority permitted salesman, who did not possess a driver's license, to drive truck, held that, whether driver was negligent in permitting incompetent substitute to drive and in failing to supervise or control substitute in driving at speed presumptively excessive under Highway Law, Sections 287, 288, and Yonkers Code of Ordinances, Art. 4, Section 67, as amended by Gen. Ordinance No. 4 of October 15, 1916, so as to make employer liable when salesman ran truck into automobiel parked along roadway, was for jury, even if liability is tested by rule at common law."
>
> *Grant* v. *Knepper*, (N. Y.) 156 N. E. 650, Syl. 1.

Also see notes on this question, 44 A. L. R. 1382, 54 A. L. R. 851, and 98 A. L. R. 1043.

We will not attempt to discuss these cases in detail, but in all of the cases which we have examined imposing liability on the master for the negligence of a third person, permitted by the master's servant to drive his car, it ap-

pears that at the time of the accident the car or truck was being used *in the business of the master,* and in most if not all of them, that the servant *was present directing and controlling the operation* of the car or truck, or at least in a position to do so.

Assuming the correctness of the decisions imposing liability on the master, we submit that they have no application to this particular case, for the reasons (1) that this car was not being operated in the interest of or on any business for petitioner; and (2) that Herbert Holt, petitioner's employee, was not in a position to supervise and control the operation of the car; did not know of or consent to the operation of the car by Ellison. We have a case here where the employee becomes hopelessly intoxicated and passes out and a stranger takes over the car, not in furtherance of the business of the employer, but for the purpose of procuring liquor and women, and at the time of the accident the car is headed in the opposite direction from the employer's place of business.

C.

The evidence is not sufficient to justify the jury in finding that Holt was a person of inebrious habits; that petitioner knew of said habits, and that petitioner was, therefore negligent in allowing Holt to drive petitioner's car.

We quote from the majority opinion of the Circuit Court of Appeals in these cases:

> "It was the duty of Crockett in the selection of Holt as his agent to use reasonable care to ascertain his competency to drive a car and the existence of habits which would make it unsafe to place so dangerous an agency in his charge. The owner owed a duty to the public to know something about the character and habits of an employee in whose charge he placed an automobile. A rapid moving and heavy vehicle be-

comes highly dangerous when negligently operated. *It is evident from the readiness with which Holt engaged in the drunken carousal so early in the morning that he must have been a man of inebriate habits and that Crockett in whose employ he had been for a year or more before the accident either knew or was charged with the duty of knowing this fact, which is further emphasized both by the continued employment of Holt after the accident for approximately a year and up to the time of the trial (whether longer or not we are not advised), and by the further fact that Crockett refused to take the stand, thereby entitling the jury to indulge in all reasonable presumptions against him. Holt's agency was not one limited by certain specific instructions, it was an agency coupled with wide discretion, and it is especially true that if Crockett knew, as he should have known, and as the jury had every right to assume that he knew, of Holt's habits, he is certainly to be charged with a result which might reasonably have been anticipated at the hands of a drunken employee.* Under the facts of this case Holt throughout was acting within the scope, or apparent scope, of an agency charging his employer with liability.

Our newspapers are filled with daily accounts of automobile wrecks resulting in serious injuries and deaths at the hands of drunken drivers, some as owners and others as employees. *Surely the courts are not called upon to encourage or license this deadly menace because forsooth the owner of a motor vehicle may relieve himself of liability in the employment of an agent of inebriate habits of which he has failed to make inquiry;* * * *"

It is perfectly clear from the foregoing quotation that the court's judgment is not based on the doctrine of respondeat superior, but is based upon the supposed negligence of petitioner in turning his car over to an employee whom he knew or should have known was addicted to the use of intoxicating liquor. However, the court's conclusions are without any foundation in the evidence.

Except for the admitted fact that Holt became intoxicated on the day of the accident there is not a scintilla of evidence in the entire record that Holt had previously ever taken a drink of liquor or that he was an incompetent driver or an irresponsible person. Yet, the Circuit Court of Appeals holds in substance that because Holt became intoxicated on the day of the accident that he was in the habit of getting drunk and that petitioner either knew or should have known this fact, and that when petitioner turned his car over to Holt he should have anticipated that Holt would get drunk and wreck the car and injure someone. These are violent presumptions to say the least. The court in effect says that if a man gets drunk once he is a drunkard and therefore shall not be entrusted on the highway with an automobile, and if an employer knows that his employee has on one occasion been intoxicated that he dare not thereafter trust the employee with his car at the risk of being charged with all the negligent acts of said employee. It must be borne in mind that there is not a scintilla of evidence in the entire record that prior to the day of the accident Holt had at any time or under any circumstances been drunk or even taken a drink of liquor. Yet the court reasons that because Holt got drunk on the day of the accident that he is therefore a drunkard, that he is in the habit of getting drunk, that he is a dangerous and irresponsible operator of automobiles, and that one who entrusts him with an automobile does so at his peril. This is exactly what the court says in this case, and the only possible basis for such conclusion is the bare fact that Holt did become intoxicated on the day of the accident.

If the fact that a man gets intoxicated on one occasion forever stamps that individual as a drunkard and a dangerous and irresponsible operator of automobiles, then we submit that there would be few automobiles on the road. It is a matter of common knowledge that men in all walks of life do get intoxicated upon occasions; some even get in-

toxicated in the day time, and some need very little encouragement. However, to stamp each and every one of these individuals as a dangerous and irresponsible person who cannot be entrusted on the highways with an automobile seems to be carrying the matter entirely too far. Such a conclusion is contrary to all human experience, contrary to all logic and reason.

Plaintiffs placed Holt on the witness stand and during his examination he was asked whether he had ever taken a drink of liquor (R. 125). Counsel for petitioner objected to this question for the reason that it had no possible bearing on any issues involved in the case, and the court sustained the objection. The issue involved in the case was this—whether Holt was on petitioner's business at the time of the accident, and if so, whether Holt was negligent. This was the sole issue in the case. As will hereinafter be shown, plaintiffs have not proceeded on the theory that petitioner was negligent in turning his automobile over to a person known to be a drunkard and irresponsible. This would have been an entirely different cause of action. As above stated, however, attorneys for petitioner objected to the question and the court sustained the objection. Counsel for plaintiffs then stated to the court that they expected to prove to the court that Holt was an habitual drinker, and that this fact was known to petitioner, his employer. This one improper question and the statement of counsel for plaintiffs is the only suggestion in the entire record that Holt had ever at any time prior to the day of the accident taken as much as one drink of liquor. Holt did not reply to the improper question. Counsel for plaintiffs could have required Holt to answer the question for the benefit of the record. This was not done, and it does not appear what Holt's answer would have been. Thereafter, plaintiffs made no effort whatever to prove that Holt was an habitual drinker and that petitioner had knowledge of that fact. Yet

the court without any basis of fact whatever draws the conclusion that because Holt got drunk on one occasion that he was a drunkard; that he was in the habit of getting drunk; that he was irresponsible and that thenceforth his employer dare not entrust him with a car. Nothing more remains to be said on this question. The conclusions drawn by the court are violent in the extreme.

In the above quotation, the court comments on the fact that Crockett had retained Holt in his employ after the accident. What does this prove? Certainly it does not prove or tend to prove that on the day of the accident petitioner knew that Holt was a drunkard. What possible bearing could petitioner's retention of Holt in his employ have had on petitioner's knowledge of Holt's habits at the time the accident occurred? None whatever.

Failure of Petitioner to Testify.

In the above quotation, the court also says that petitioner "refused to take the stand, thereby entitling the jury to indulge in all reasonable presumptions against him." We cannot understand why the court uses the word "refused". No one requested petitioner to take the witness stand in this case, and there was no occasion whatever for his doing so. Petitioner knew absolutely nothing about the accident involved in this case, and it was wholly unnecessary for petitioner to testify as to Holt's authority in selling cars, because Holt was placed upon the witness stand by the United States of America, and McElroy, and testified fully with reference to his authority (R. 96 to 101). This testimony was later expressly adopted by Hanna (R. 144). There is no evidence in the record tending in any way to discredit or contradict the evidence of Holt on this proposition. There was no necessity for petitioner to take the witness stand and his failure to do so did not entitle the jury

to indulge in any presumptions or inferences against petitioner. The principle which plaintiffs seek to invoke has no application whatever to this case. The principle sought to be invoked correctly stated is as follows:

> "The law creates a presumption, where the burden is on a party to prove a material fact peculiarly within his knowledge and he fails without excuse to testify, that his testimony, if introduced, would be adverse to his interests. *However, the failure of a party to offer himself as a witness does not justify any prejudicial inferences against him, unless it is shown that there were facts peculiarly within his knowledge which were not known so fully to any other witness.*"
>
> 20 Am. Jur. page 193, Section 190.

> "Where the burden is on a party to prove a material fact *peculiarly within his knowledge,* and he fails without excuse to testify, the presumption according to the weight of authority arises that his testimony, if introduced would be adverse to his contention."
>
> 10 R. C. L. 887, Sec. 36;

Also see 20 Am. Jur. pages 194-195. However, before this presumption can arise, the facts must be shown to lie peculiarly within the party's knowledge. They must be in issue and the burden must be upon the party to prove said facts. In the principal case, the facts with reference to Holt's authority did not lie peculiarly within petitioner's knowledge; Herbert Holt knew the facts as well as petitioner. Holt was placed on the witness stand by the plaintiffs and testified fully as to his authority. Therefore, the law is clear that under such circumstances the jury were not justified in drawing any unfavorable presumptions or inferences against petitioner.

> "Failure to call a witness to a particular fact or facts should not prejudice a party relying thereon if the fact

be fully covered by the uncontroverted evidence of other witnesses."

Schiffler v. *Kissel,* 103 W. Va. 545, 138 S. E. 107, Syl. 5.

"No presumption arises from failure of claimants to testify; the execution and delivery of the notes evidencing the debts being solely in the knowledge of the debtor, who testified for them, *and the consideration being equally in her knowledge,* and there being no allegation of collusion between them."

Murphy's Hotel Co. v. *Herndon's Admr.* (Va.), 91 S. E. 634, Syl. 1.

"There is no presumption against a defendant for failure to call witnesses, or any particular witness, when the plaintiff, carrying the burden of proof, has not made a prima facie case.

Such presumption cannot be used to relieve the plaintiff from the burden of proving his case."

Cooper v. *Upton,* 60 W. Va. 648, 64 S. E. 523, Syls. 4 and 5.

D.

The Circuit Court of Appeals erred in deciding these cases upon issues not raised in the pleadings, not submitted to the jury, nor considered by the District Court, and upon which issues no evidence whatever was introduced by any of the parties' hereto.

Although the Circuit Court of Appeals attempts to justify its decision on the ground of agency, it is perfectly clear that the sole basis of the decision is that Holt was a man of inebrious habits; that petitioner either knew or should have known such fact, and that, therefore, petitioner was negligent in turning his car over to Holt. Obviously this is not the cause of action declared on by plaintiff. It was not the cause of action tried in the lower court and submitted to the jury. If such facts would constitute a cause of action,

it would be a cause of action based on primary negligence of petitioner in turning his car over to a person known to be of inebrious habits. No case has come to our attention which goes so far as to hold that an employer would be negligent under such circumstances. There are many cases to the effect that when the owner of a car turns the car over to another person known to be an incompetent or a reckless driver, that the owner is liable for the negligent acts of such operator, but that is not the question here. There is not the slightest evidence in the record that Holt was an incompetent or a reckless operator of automobiles.

An examination of the three complaints filed in this case discloses clearly that the theory upon which the plaintiffs relied for recovery against petitioner was that Ellison and Holt were petitioner's *agents* at the time of the accident; that they were on *petitioner's business;* and that they were *negligent.* Petitioner's answers denied that at the time of the accident either Holt or Ellison were his agents and on his business. Therefore, the issue was clear-cut. The issue was whether at the time of the accident Holt and Ellison were on petitioner's business. This was the only issue. The complaints did not allege or intimate that at the time petitioner turned his car over to Holt, Holt was a drunkard and irresponsible, and that petitioner knew this fact and was, therefore, negligent in turning the car over to Holt. If such facts had been alleged in the complaint, this would have constituted an entirely different cause of action from the one actually declared on. There can be no question about this. A cause of action based on agency and negligence of the agent is entirely different from a cause of action for negligently turning over to a person known to be intoxicated or addicted to the use of intoxicating liquors a dangerous instrumentality such as an automobile. The two causes of action are as different as day and night. If a person turns his car over to a person known to be intoxicated, or to be in

the habit of becoming intoxicated, he might be responsible for the injuries negligently inflicted by such person on a third party, but not on the ground of agency, but because of his negligence in turning over a dangerous instrumentality to an irresponsible individual. He would be liable on account of his *primary negligence* in turning his car over to such an irresponsible individual. This particular cause of action is involved in the cases of *Department of Water Power, etc.*, v. *Anderson*, 95 F. (2d) 577, and *Tolbert* v. *Jackson*, 99 F. (2d) 513, cited in the opinion of the Circuit Court of Appeals.

It is perfectly clear that the court has decided this case not on the cause of action alleged in the complaint, namely, a cause of action involving agency and the negligence of the agent, *but* on an entirely different cause of action, namely, the negligence of Crockett in turning his car over to a person known to be a drunkard and irresponsible. The language of the opinion makes this entirely clear; see pages 194 and 195 printed record. In the majority opinion, the case of *Tolbert* v. *Jackson*, 99 F. (2d) 513, is cited and relied on. This case involved the conduct of the owner of a car who turned it over to a person known to be intoxicated. If the court intended to decide the principal case upon the question of agency, which was the cause of action alleged in the complaint, it would be entirely unnecessary and superfluous to point out and emphasize the fact that Holt was a drunkard and that petitioner knew it. This would make no difference on the issue of agency, and the fact that Holt was a drunkard would certainly not tend to prove agency where agency otherwise did not exist. Such facts as Holt's addiction to liquor, if indeed, they be facts, would only be material if recovery was sought on the ground that petitioner was negligent in turning his car over to a person known to be drunk or to be in the habit of becoming drunk.

This question has absolutely no bearing on the question of agency and if no agency existed between Holt and petitioner, the fact that Holt was a confirmed addict would not

What we have said is clearly supported by the law of West Virginia. We call the court's particular attention to the case of *Jenkins* v. *Spitler,* (W. Va.) 199 S. E. 368. In that case, plaintiff sued defendants alleging that defendants' automobile, operated by defendants' agent, had negligently inflicted injury on her. In this case a salesman employed by the defendants had borrowed defendants' car for the purpose of taking a trip. The court held that the employee was not on the business of the defendants at the time of the accident and, therefore, that the defendants were not chargeable with the negligence of the operator of the car. The court further held, *and this is important,* that there was evidence in the case to the effect that when defendants turned this car over to the salesman that the brakes were defective and that the defendants either knew or should have known this fact. The court further held that this act of negligence would have been sufficient to support the jury's verdict against the defendants *had this cause of action been pleaded,* but the court said that the defective brakes were not pleaded by the plaintiff, that this issue was not involved in the case, and, therefore, the jury's verdict could not be upheld on the theory that the defendants had turned the car in question over to their employee with the knowledge of the defective brakes. In discussing this question the court said:

> "Not only was the matter of defective brakes not pleaded but the question was not submitted to the jury under instructions. Only in an incidental way did the evidence about them get into this record, and then it came in by the voluntary statement of one witness."

We call the court's particular attention to this case. What the court says in the case of *Jenkins* v. *Spitler* is equally

applicable to this case. In that case the question of the defective brakes was not pleaded and the matter was not submitted to the jury in the instructions. The same is true in this case. The negligence of petitioner in turning his car over to a person known to be in the habit of getting drunk was not pleaded and this issue was not submitted to the jury in a single instruction offered. To the contrary, the jury were repeatedly told that before they could find against petitioner that they must find that at the time of the accident Holt was acting on petitioner's business. This was the issue and the only issue tried in this case. If plaintiffs had proceeded on the theory of petitioner's negligence in turning his car over to a person known to be in the habit of becoming intoxicated, then petitioner would have had an opportunity to introduce testimony to the contrary. However, petitioner has not had such an opportunity, because the pleadings filed in the case did not proceed upon any such theory; there was no such issue involved, no evidence whatever was introduced upon such issue, and under the pleadings it would have been improper to introduce such evidence.

We respectfully submit that petitioner has had no opportunity to meet the issue upon which this case was decided. He should be given this opportunity under proper pleadings, advising him specifically what act of negligence plaintiffs rely on.

For the foregoing reasons, petitioner respectfully submits that the writs of certiorari prayed for be granted, and that the judgments complained of be reviewed and reversed.

Respectfully submitted,

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(3906)

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 65

J. C. CROCKETT, PETITIONER

v.

THE UNITED STATES OF AMERICA

No. 66

J. C. CROCKETT, PETITIONER

v.

GEORGE H. MCELROY AND PETER A. HANNA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinions of the Circuit Court of Appeals (R. 186–206) are reported in 116 F. (2d) 646.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fourth Circuit was

entered December 21, 1940 (R. 207). A petition for rehearing was denied February 6, 1941 (R. 207–208). The petition for a writ of certiorari was filed May 1, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In actions for personal and property damages resulting from a collision between petitioner's car and a government vehicle, the jury returned verdicts against petitioner. The question presented is whether there was any evidence that petitioner's car was being driven on the business of petitioner at the time of the accident.

STATEMENT

The various suits involved herein were instituted in the United States District Court for the Southern District of West Virginia, in November 1939, to recover for personal and property injuries resulting from an automobile accident (R. 1–3, 158–159, 166–169).[1] The accident involved three cars, one owned by petitioner Crockett, one by the United States, and one by Peter A. Hanna. The United States sued for damages to its car; McElroy, the agent of the United States, sued for personal injuries; while Hanna sued for both personal injuries and property damages.

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[1] By agreement of counsel the various cases were ordered to be consolidated and heard together (R. 13–15, 174–175).

Petitioner operates an automobile sales business under the name of Central Motor Sales, at Princeton, West Virginia (R. 8, 169).[2] For over a year Herbert Holt[3] acted as a salesman for petitioner, working on a commission basis, at such times as Holt desired to work (R. 97, 98, 117). Holt had authority to use petitioner's cars for business purposes (R. 98) and while he usually consulted petitioner before demonstrating a car to a prospective purchaser (R. 99), Holt had authority to sell any of petitioner's cars without special authority and to seek out prospective purchasers for this purpose (R. 122–125).

On the morning of February 20, 1939, Holt arranged with petitioner to drive one of petitioner's cars, a 1936 model Plymouth sedan, to Hiawatha, West Virginia, in order to negotiate a deal with one Hale, a prospective customer (R. 117–118). Instead of proceeding directly to Hiawatha, Holt drove down the main street of Princeton and stopped to talk to Frank Ellison (R. 81, 118), a friend of his (R. 81). Ellison got into the car and Holt inquired as to a prospect, a close neighbor of Ellison, to whom Holt had previously attempted to sell a car (R. 118). After fifteen or twenty

[2] In the various complaints it was erroneously alleged that the Central Motor Sales was a corporation (R. 1, 158).

[3] Herbert Holt was erroneously sued as Robert Holt. By order of the court the pleadings were amended to show correctly the name of defendant as Herbert Holt (R. 13–14).

minutes, at about nine o'clock, the two men were joined by Robert Weikel (R. 76, 118–119), a friend of Ellison, but unknown to Holt (R. 85, 119). Holt attempted to interest Weikel in buying a car (R. 82) but, on failing to do so, drove to a coal yard at Weikel's request to drink Weikel's liquor (R. 76, 89, 119). After finishing the bottle, Holt drove the men back to town and more liquor was bought, Weikel paying for it (R. 77, 89, 119).[4]

Holt then drove the men to an old road and the drinking continued (R. 77, 90, 91, 119). During this time Holt approached Weikel again about purchasing a car (R. 75, 80, 86, 120–121). After about an hour and a half, at some time between 10:30 A. M. and 2:30 P. M. (R. 77–78, 89), they returned to Princeton where Weikel supplied the money for more liquor (R. 77). The men then drove to a filling station, where, according to Ellison's testimony, Holt requested Ellison to drive (R. 78). Ellison declined, not having a driver's license, and Weikel drove at Ellison's suggestion (R. 78, 83, 87).[5] At about this time, Holt "passed out" from excessive drinking (R. 78, 84–85, 87, 88) and remained stretched out on the rear seat of the car up to the time of the accident (R. 26, 38, 41, 42, 47, 84–85, 107, 113, 115).

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[4] Weikel testified that he supplied the money at Ellison's request (R. 89).

[5] Weikel testified that Ellison said to him: "Bob, drive it and see how you like it" (R. 87).

Weikel drove to a sandwich shop, about three-quarters of a mile from Princeton, and Ellison and Weikel went inside (R. 42, 78, 88, 109, 110). After staying at the sandwich shop a short time Weikel and Ellison, accompanied by a girl named Virgie Keatley, returned to the car, and drove to a beer garden about five miles distance from the sandwich shop, in order to have a "party" (R. 39, 40, 78, 79, 84, 92, 111, 113, 114, 115, 116). Both men and the girl were obviously under the influence of liquor (R. 47, 84, 91, 107, 111, 114, 116). Ellison drove (R. 40, 42, 47, 79, 108, 113–114, 115), and sometime after leaving the sandwich shop, between 3 and 5 P. M. (R. 24, 39, 73, 112, 114, 116, 128), collided with respondent's car.

The accident occurred when Ellison, driving at a very high speed, passed a truck at a crest of a hill. The respondent McElroy, an employee of the Federal Bureau of Investigation, driving on business a car owned by the United States, was proceeding in the opposite direction and did not have sufficient time to avoid crashing into petitioner's car. The respondent Hanna was driving closely behind McElroy and was unable to avoid running into the rear of the government car (R. 25, 32, 40–41, 44–45, 68, 72, 128–132, 136–139).

At the close of both the plaintiffs' and defendants' evidence, motions on behalf of petitioner and others for a directed verdict were overruled by the

Court (R. 104–105, 144–145).[6] The case was submitted to the jury, which was instructed on the issue of *respondeat superior* to determine whether the plaintiffs had proved—

> by a preponderance of the evidence * * * that at the time of the accident involved * * * the said Plymouth sedan was being operated on the business of J. C. Crockett, or for some purpose connected with the business of the said J. C. Crockett (R. 152).

The jury found as follows: For the United States against Crockett, Holt, and Ellison, in the sum of $575.00; for McElroy and Hanna, against Crockett, Holt, and Ellison, in the sum of $2,795.33 and $3,116.50, respectively.[7] Motions for new trial were overruled and judgments were entered in accordance with the verdicts of the jury (R. 17–19, 178–180). On appeal, the Circuit Court of Appeals for the Fourth Circuit affirmed, Judge Dobie dissenting (R. 186–206).

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[6] On the issue of the responsibility of petitioner for the negligence of the occupants of his car, Hanna adopted as his evidence the same testimony as introduced by the other plaintiffs (R. 144).

[7] The United States and McElroy also sued Hanna (R. 1, 158) and the latter counterclaimed against McElroy (R. 168). The jury reached a verdict in Hanna's favor on the suit against him by McElroy and the United States, and in McElroy's favor on Hanna's counterclaim (R. 177).

ARGUMENT

Petitioner concedes that Ellison's negligence was the responsible cause of the collision and makes no contention that petitioner is absolved from liability merely by reason of the fact that the car was driven by a person other than the agent to whom it had been entrusted (Pet. pp. 49–51). Petitioner contends, however, that there was no evidence that the car was being operated on his business or with the knowledge and consent of his agent at the time of the accident.[8] It would seem sufficient answer that this Court will not review the question of the sufficiency of the evidence where the jury's verdict has been approved by both the trial court and the court below. *El Paso R. R. Co.* v. *Vizard,* 211 U. S. 608, 611; *Story Parchment Co.* v. *Patterson Co.,* 282 U. S. 555, 560; *Seaboard Air Line Ry.* v. *Renn,* 241 U. S. 290, 294–295; *cf. Brewer Oil Co.* v. *United States,* 260 U. S. 77, 86; *Morimura* v. *Tabeck,* 279 U. S. 24, 27; *Altoona Publix Theatres, Inc.* v. *American Tri-Ergon Corp.,* 294 U. S. 477, 480. Even assuming that this question is now open to review in this Court, however, the decision below, we submit, is correct.

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[8] Petitioner also challenges the ruling of the court below that petitioner knew, or ought to have known, that Holt was addicted to drinking and could not safely be permitted to drive an automobile and hence that petitioner was personally chargeable with negligence. It is clear, however, that this was only an alternative ground of decision and that the court below also held the petitioner liable for the negligence of his agent (R. 190–194, 195–196).

drive the car for his own purposes. In two of them, *Jenkins* v. *Spitler,* 120 W. Va. 514, 516–517, and *Shrimplin* v. *Simmons Auto Co.* (W. Va.), 9 S. E. (2d), 49, 52, the *Cochran* case was cited with approval.

The test of the employer's liability under West Virginia law would thus seem to be whether the trip was undertaken to promote goodwill and seek out customers in furtherance of the employer's business. In this view, there was substantial evidence to support the jury's verdicts, whether the question of the sufficiency of the evidence is one of local law or, as the court below held (R. 192–193), is for the independent determination of the federal courts. *Gorham* v. *Mutual Benefit Health and Accident Assn.,* 114 F. (2d) 97, 99; cf. *Herron* v. *Southern Pacific Co.,* 283 U. S. 91. There was ample evidence that Holt was authorized to seek out prospective purchasers without specific authority (R. 122) and there was evidence from which the jury could have found that Holt was likewise authorized to pick up friends in order to secure information as to possible customers (R. 124). From the testimony that Holt inquired of Ellison as to a prospective customer (R. 118), and at least twice endeavored to sell Weikel a car (R. 75, 80, 82, 86, 120–121), the jury could also have found that the trip on which the accident occurred was undertaken to further the petitioner's business. And while Holt was ap-

parently unconscious when the trip was continued from the sandwich shop, the jury was entitled to conclude that Ellison's driving of the car was within the license extended by Holt's previous invitation (R. 78). There was thus ample evidence that, while the entire journey served the personal pleasure of the parties, the trip was initiated and continued, in part at least, as a means of promoting the sale of petitioner's cars. Cf. *Shahan* v. *Jones,* 115 W. Va. 749.

2. The court below correctly construed the applicable law of West Virginia. Under that law Holt's authority to seek out customers and contact friends for business purposes included authority to make some digressions from his business at the request of a friend or prospective purchaser in order to facilitate sales. Whether the journey in question went beyond the permissible limits of his employment is a question of degree turning on the particular facts of this case. The jury's verdicts have been approved by both courts below. In these circumstances, the question of the sufficiency of the evidence would not seem to warrant the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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